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In The

# Supreme Court of the United States

October Term, 1985

JOHN RASKIEWICZ,

*Petitioner,*

*vs.*

THE TOWN OF NEW BOSTON: MANCHESTER REDIMIX CONCRETE, INC.; *et al,*

*Respondents.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI FOR RESPONDENTS MANCHESTER REDIMIX CONCRETE, INC. AND ITS PRESIDENT, NORMAN BISSONNETTE

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## TABLE OF CONTENTS


*Page*

Table of Contents ..... i

Table of Citations ..... i

Statement of the Case ..... 1

Reasons for Denying the Writ ..... 7

I. The petition for writ of certiorari should be denied because the decision of the Court of Appeals is not in conflict with decisions of other Federal Courts of Appeals or state courts of last resort nor does it conflict with applicable decisions of this Court or involve substantial or unresolved federal questions ..... 7

II. The petition for writ of certiorari should be denied because the Court of Appeals did not decide any federal questions and dismissed the petitioner's claims on the ground that he had not offered any material facts in support of his claims. ..... 11

Conclusion ..... 14


## TABLE OF CITATIONS

**Cases Cited:**


Butz v. Economu, 438 U.S. 478 (1978) ..... 13

Cole v. Gray, 638 F. 2d 804 (C.A. 5, 1981), *cert. denied,* 454 U.S. 838 (1981) ..... 13

*Contents*

*Page*

Creative Environments, Inc. v. Estabrook, 680 F. 2d 822 (C.A. 1, 1982), *cert. denied,* 459 U.S. 989 (1982)....9, 10

First National Bank of Arizona v. Cities Service Co., 391 U.S. 253 (1968)..... 13

Winslow v. Holderness Planning Board, 125 N.H. 262, 48[illegible] A. 2d 114 (1984)..... 7, 8

**Statutes Cited:**

42 U.S.C. § 1981 ..... 4

42 U.S.C. § 1983 ..... 4, 9

42 U.S.C. § 1985 ..... 4

**Rule Cited:**

Supreme Court Rule 17.....7, 10

**United States Constitution Cited:**

Fourteenth Amendment..... 4

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## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI FOR RESPONDENTS MANCHESTER REDIMIX CONCRETE, INC. AND ITS PRESIDENT, NORMAN BISSONNETTE

## STATEMENT OF THE CASE

In 1964, the petitioner purchased a parcel of undeveloped land in New Boston, New Hampshire for approximately $4,000 (A732).[1] In 1974, he applied to the respondent Town of New Boston [hereinafter "Town"], pursuant to its local ordinance, for a permit to remove gravel from his property. On May 2, 1974, in accordance with the provisions of the ordinance (A323), the Town Selectmen held a public hearing on the petitioner's

1. References to the record below shall refer to the appendix before the Court of Appeals and shall be cited as "A" followed by a page number. Citations to the District Court and Court of Appeals decisions below shall be from the appendix to the petition for writ of certiorari and shall be cited as "PA" followed by a page number.

application (A1222). A question was raised at the hearing about the location of a proposed driveway to the property; as a result, the Selectmen scheduled a second hearing for May 16, 1974 (A481, A1226-A1228).

At the request of the petitioner's counsel, the second public hearing was continued and rescheduled for June 6, 1974 (A1228-A1230). In the words of the petitioner himself, "at this second public hearing numerous objections concerning my permit application to remove the sand and gravel from my land were raised by the selectmen and a number of residents of the Town of New Boston as well as Selectman Nickerson of Goffstown" (A482). The petitioner alleges that he was unprepared for these objections and had not hired experts to refute them. *Ibid.* On June 13, 1974, the Selectmen denied the petitioner's application for a permit.

On August 8, 1974, the petitioner filed an action in state court against respondents Harold Strong, George Hawkins and Roland Sallada [hereinafter "Selectmen"] (A1256-A1261). The petitioner claimed that the Town's gravel removal ordinance was adopted in violation of New Hampshire law and amounted to an unconstitutional taking of his land without just compensation. Alternatively, he claimed that the actions of the Selectmen in denying a permit to him were "unreasonable and unlawful, arbitrary and capricious and contrary to the facts as stated" (A1260).

Hearings on the petitioner's state court action were conducted in the Hillsborough Superior Court in April 1976 (A788-A1252). The petitioner claims that one of the Selectmen made a statement to him and another witness at the time of these hearings to the effect that the petitioner would never receive a gravel permit from the Town (A489). On April 22, 1976, the Master who heard the case issued an order continuing the action on the grounds that,

"*the parties have agreed to further negotiate* and the petitioner will file a new application with the Town of New Boston for a permit to remove sand and gravel" (A278). (emphasis supplied).

Negotiations, however, were unsuccessful and the petitioner applied to the Hillsborough Superior Court for further hearings on the matter (A21-A22). On June 28, 1977, another hearing was conducted by the Master, as a result of which he issued an order "*to which there is no objection*" (A1279). (emphasis supplied). The order provided that the petitioner should submit a detailed proposal for his gravel removal operation to the Town, that the Town should respond stating its "specific areas of concern" and that, "if the Selectmen choose not to issue a permit, they shall specify the reasons for that decision" (A1280-A1283). The Master further provided that, "in the event that the parties are unable to reach an accord under this order, the recessed hearing shall be rescheduled upon the request of either party . . ." (A1282).

The petitioner did, in fact, submit a new proposal to the Town for a gravel permit. The Town then issued a list of environmental and other concerns to the petitioner and the petitioner in turn supplied information in response thereto (A23-A24). In 1978, the Town offered to issue the petitioner a gravel permit for his New Boston property, subject to certain terms and conditions. Among those conditions was a requirement that the petitioner dismiss his legal action against the Town in the Hillsborough Superior Court (A24). The petitioner agreed to the Town's conditions, but requested that certain other changes be made in the terms of the permit, particularly its effective date.

The petitioner and the Town continued to negotiate, albeit unsuccessfully, for several additional months (A25-A26). In July of 1979, the petitioner eventually notified the Hillsborough Superior Court that the parties again had been unable to reach agreement and requested a new hearing on his petition (A26-A27).

The state court apparently never acted on the petitioner's request, and he apparently did not pursue it.

In the summer of 1979, the petitioner retained a real estate broker to sell his New Boston land (A485). The petitioner's broker contacted respondent Manchester Redimix Concrete, Inc. [hereinafter "Redimix"] sometime that summer or fall (A409). Prior to that time, Redimix had had no involvement with the petitioner, his land or the Town (A408).

Redimix purchased the petitioner's property in 1979 for $217,000 (A29). According to the petitioner, this price was less than the then fair market value of his property. *Ibid.*; (A486-A487).

On March 20, 1980, a representative of Redimix attended a New Boston Selectmen's meeting "to be advised whether the Raskiewicz Gravel Removal Permit could be changed to the Manchester Redimix Co. as they are satisfied to work under the same regulations . . ." (A320). The required hearing was subsequently held by the Selectmen on Redimix's application and a permit was granted. The petitioner himself was present at the Selectmen's hearing (A487-488).

Three years later, the petitioner filed a civil action in the United States District Court for the District of New Hampshire against the Town, the Selectmen, Redimix and its president, and 28 individual citizens who had intervened in his state court action on the side of the Town. In 19 separate counts, stated and restated in 83 pages, the petitioner's amended complaint alleged a conspiracy among all of the respondents to deprive him of unspecified constitutional rights secured to him by the Fourteenth Amendment to the Constitution and 42 U.S.C. §§ 1981, 1983 and 1985, a conspiracy to prevent him from engaging in interstate commerce in violation of the Sherman Act and the Clayton Act, a conspiracy to commit extortion in violation of the so-called RICO

Act and a conspiracy to violate a myriad of state created rights. In each case, the gravamen of the petitioner's claim was that the respondents had conspired to deny him a permit to remove sand and gravel from his property in New Boston and that, as a result, he had been compelled to sell his property to Redimix for less than full value. The complaint prayed for $90 million in damages, plus interest, costs and attorneys' fees.

Redimix filed its answer to the amended complaint on August 15, 1983 and a subsequent amendment to its answer on September 15, 1983. In substance, Redimix denied the material allegations of the complaint and, in particular, that it was party to any conspiracy to deprive the petitioner of a gravel removal permit (A239-A251, A438-A441).

On September 13, 1983, Redimix filed a motion for summary judgment, supported by the affidavits of Peter Dowling and Norman Bissonnette, two of its corporate officers, and Joseph Millimet, Esquire, counsel to the corporation (A399-A410). The Town, the Selectmen and the Townspeople also filed motions for summary judgment, supported in each case by affidavits (A367-A380, A493-A544, A554-A558, A603-A604). The petitioner, in turn, objected to the motions of the various respondents and filed affidavits from himself and a Mr. Lars Ohman (A471-A490, A593-A597).

On December 2, 1983—just prior to the scheduled hearing on the respondents' dispositive motions—the petitioner filed a series of requests for admissions pursuant to Rule 36, Federal Rules of Civil Procedure (A545-A547). Responses to the petitioner's requests for admission were filed by Redimix and the Town on December 15, 1983 and December 16, 1983, respectively (A590-A592, A598-A602). (*See also*, A613-A615, A618-A620).

Prior to the hearing on the summary judgment motions, the Town had also responded to a request by the petitioner for production of documents by essentially turning over all of its files concerning the petitioner's application for a gravel removal permit and the ensuing state court litigation between the petitioner and the Town in the Hillsborough Superior Court (*See* A195-A198, A324-A326). Additionally, at the hearing held by the District Court on the respondents' motions, a copy of the transcripts of all testimony before the state court was also made a part of the federal record (A788-end).

The District Court held a hearing on December 16, 1983 on the respondents' motions for summary judgment (A693). No additional evidence was offered by the petitioner at that hearing, but counsel for the petitioner was given wide latitude to argue and make representations as to the petitioner's case and the matters which he expected to prove (*E.g.*, A731-A732, A734-A735).

On January 13, 1984, the District Court issued its memorandum, opinion and order granting all of the respondents' motions for summary judgment. In addition, the court found that the petitioner's complaint was "frivolous, unfounded and reckless" (PA41a). Accordingly, the court ordered the petitioner and his counsel to "equally recompense all defendants for their expenses and reasonable attorneys' fees" (PA43a).

The petitioner filed his notice of appeal to the First Circuit Court of Appeals on February 8, 1984 (A663). The petitioner had previously filed a motion to stay the imposition of costs and attorneys' fees pending appeal (A652). The District Court granted the petitioner's motion subject to the filing of a supersedeas bond in the amount of $10,000. The petitioner filed the required bond with the District Court on February 15, 1984.

On February 7, 1985 the Court of Appeals affirmed the District Court's grant of summary judgment in behalf of the

respondents. The court concluded its opinion by noting that, "The district court's conclusion that Raskiewicz's federal claims were 'totally frivolous and unwarranted' was completely justified" and itself ordered that the petitioner be taxed with double the costs of the appeal (PA17a).

## REASONS FOR DENYING THE WRIT

### I.

### THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE DECISION OF THE COURT OF APPEALS IS NOT IN CONFLICT WITH DECISIONS OF OTHER FEDERAL COURTS OF APPEALS OR STATE COURTS OF LAST RESORT NOR DOES IT CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT OR INVOLVE SUBSTANTIAL OR UNRESOLVED FEDERAL QUESTIONS.

The petition for writ of certiorari does not even purport to be based upon considerations appropriate to the exercise of this Court's jurisdictions in such matters. *See generally*, Supreme Court Rule 17. There is no suggestion in the petition that the First Circuit decision below conflicts with the decisions of other courts of appeals or state courts of last resort in similar cases. In essence, the petition merely alleges that the First Circuit erred in affirming the action of the District Court in granting the respondents' motions for summary judgment.

To the extent that the petitioner relies upon *any* purported conflict among courts, he suggests that the First Circuit and/or District Court decisions failed to follow a decision of the New Hampshire Supreme Court on a matter of state law (Petition for Writ of Certiorari, p. 11-15). The New Hampshire case upon which the petitioner places such great emphasis is *Winslow v. Holderness*

*Planning Board*, 125 N.H. 262, 480 A. 2d 114 (1984). In that case, the New Hampshire Supreme Court held that the action of a municipal planning board in reviewing an application for land subdivision should be deemed to be quasi-judicial for purposes of applying a stricter state rule of administrative common law in deciding whether to disqualify a member of the board and in determining the effect of such a disqualification upon acts of the board in which the official had participated. Applying the rule to the facts of the case before it, the court held that a planning board member who had expressed support for the subdivision application before he became a member of the board was disqualified to act upon the application and that his participation in the approval of the application rendered the approval invalid.

The petitioner claims that his allegations of bias upon the part of the Selectmen were sufficient under the rationale of the *Winslow* case to cause the federal courts to grant him relief. Even assuming the existence of a conflict between the decision of the Court of Appeals[2] and the *Winslow* case, however, the petitioner has stated no adequate basis for the issuance of a writ of certiorari. In its citation of the New Hampshire Constitution, New Hampshire statutes and New Hampshire case law, the Supreme Court of New Hampshire made it clear in the *Winslow* case that its decision rested upon *state* law. *Id.* at 125 N.H. 267-268. Consequently, the petition presents no substantial *federal* question and the writ should be denied.[3]

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2. It is interesting to note that the District Court could hardly be chastised for not considering the *Winslow* case because the District Court issued its opinion in the case at bar on January 13, 1984, whereas the New Hampshire Supreme Court did not render its decision in *Winslow* until July 26, 1984.

3. The fact of the matter is that there is not a conflict between the decisions of the Court of Appeals and the District Court, on the one hand, and the New Hampshire Supreme Court in the *Winslow* case, on the other hand. The opinions of the two federal courts are devoid of any language which could be construed

(Cont'd)

There is nothing else in the petitioner's claims of due process denials that raises any substantial federal question. As the First Circuit noted, the "federal courts do not sit as a super zoning board or a zoning board of appeals" (PA13a). The fact that the petitioner alleges bias and prejudice upon the part of the municipal body which denied him his land use permit does not make his case unique or significant.

> *Every* appeal by a disappointed developer from an adverse ruling by a local . . . planning board necessarily involves some claim that the board exceeded, abused or "distorted" its legal authority in some manner, often for some allegedly perverse (from the developer's point of view) reason. It is not enough to simply give these state law claims constitutional labels such as "due process" or "equal protection" in order to raise a substantial federal question under § 1983.

*Creative Environments, Inc. v. Estabrook,* 680 F. 2d 822, 833 (C.A. 1, 1982), *cert. denied,* 459 U.S. 989 (1982).

Likewise, the petitioner's claim that he did not receive adequate notice of the matters with which he would have to

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(Cont'd)

to hold that an unsuccessful applicant for a gravel permit is not entitled to *any* judicial relief if he can show actual bias upon the part of a member of the administrative tribunal which denied him the permit. On the contrary, the Court of Appeals stated that, "where, *as here*, the state offers a panoply of administrative and judicial remedies, litigants may not ordinarily obtain federal court review of local zoning and planning disputes by means of 42 U.S.C. § 1983" (PA13a). (emphasis supplied). The court expressly did not reach the question of whether or not "sufficiently serious, supported, assertions of this type could make out a due process claim under Section 1983" (PA14a-PA15a). The holding of the court was that the issue was moot because the petitioner's pleadings and supporting affidavits failed to present a genuine issue of material fact supporting any such inference of actual bias (PA15a).

contend at the recessed hearing upon his permit application raises no issue of national import. Where the petitioner does not now challenge the constitutionality of the Town's gravel removal ordinance and does not claim that the State of New Hampshire would not afford him a remedy for his claim of inadequate notice, the petitioner raises no issue worthy of this Court's consideration. "The conventional planning dispute—at least where not tainted by fundamental procedural irregularities, racial animus, or the like—which takes place within the framework of an admittedly valid state . . . scheme is a matter primarily of concern to the state and does not implicate the Constitution." *Creative Environment v. Estabrook, supra* at 833.

Perhaps in recognition of the fact that his vague references to denials of "due process" and to a "taking" constitute no more than an exercise in labeling, the petitioner attempts to interest this Court in his case by showcasing his purported First Amendment claim. In summary, the petitioner claims that his constitutional right of access to the courts was infringed by the Town when, after years of litigation and negotiations, it agreed to issue him a gravel removal permit upon the condition that he withdraw his state court litigation. The petitioner himself acknowledges that this claim (which was not even made in his complaint and was only mildly asserted in the District Court and the Court of Appeals) was treated as "frivolous" by the lower courts (Petition for Writ of Certiorari, p. 10). The fact that the petitioner seeks to elevate its stature before this Court by devoting more space to it here than he did in any of his prior pleadings should not cause it to now be given any more consideration than it was below.

Simply stated, there is nothing in this petition which satisfies the requirements of Supreme Court Rule 17 or which would otherwise warrant this Court to exercise its discretion to issue a writ of certiorari. The petitioner's attempt to clothe his state

claims, if any, in federal garb and to attach a $90,000,000 price tag to the finished product is indeed frivolous.

## II.

## THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE COURT OF APPEALS DID NOT DECIDE ANY FEDERAL QUESTIONS AND DISMISSED THE PETITIONER'S CLAIMS ON THE GROUND THAT HE HAD NOT OFFERED ANY MATERIAL FACTS IN SUPPORT OF HIS CLAIMS.

The *sine qua non* of the petitioner's antitrust claim and of his federal civil rights claims against Redimix and the other non-governmental respondents was the existence of a conspiracy. The Court of Appeals expressly found that the petitioner had raised no material issue with respect to this essential element of his claims:

> Raskiewicz's inference of conspiracy, a necessary ingredient, also, of his anti-trust claim, is even less compelling. We are required to respect all inferences that reasonably can be drawn from the facts, but we cannot ignore uncontested facts that render inferences unreasonable or, in this case, fantastic. It is uncontested that Redimix had no involvement with the Town or Raskiewicz before Raskiewicz's agent contacted the company in the summer or fall of 1979. At that point in time, Raskiewicz had twice been offered a permit after extensive negotiations, had chosen not to accept them and, by his own admission, had given up his quest for a permit. The timing of Redimix's entry on the scene alone punctures the inference that the Board and Redimix conspired to deprive

> Raskiewicz of a permit during the years he sought one (1974-1979). Moreover, the fact that Redimix tried to accept the very permit offered Raskiewicz and eventually received a permit containing terms and conditions similar to those imposed on Raskiewicz dispells any inference of conspiracy or bias to be drawn from Bissonnette's confidence that he could secure a permit and the Board's prompt grant of a permit to Redimix. We therefore find no material issue as to either the Section 1983 or Sherman Act claims (PA16a-17a).

Similarly, with respect to the gravamen of the petitioner's federal civil rights claims—that he had been denied a permit because of the bias of the Selectmen—the Court of Appeals found that, "the record falls far short of creating a genuine issue of material fact with respect to such a claim" (PA15a). As the court stated:

> We see nothing that supports an inference of actual bias, let alone corruption. The Board's conduct in the application proceedings and state court action was not probative of illegal bias. Indeed, there is no indication that the Board's treatment of Raskiewicz was any different from the treatment accorded to other applicants. Further, any negative inference to be drawn from the purportedly "key" statement by [one of the Selectmen] that Raskiewicz would never be given a permit is completely negated by the fact that the Board did in fact offer Raskiewicz a permit although it was not required by the ordinance to do so (PA15a.)

This case, therefore, does not involve any rulings by the Court of Appeals on significant federal questions. The court merely

found that the petitioner's conclusory allegations were unsupported by any facts or reasonable inferences to be drawn from such facts.

The respondents' motions for summary judgment and supporting affidavits called upon the petitioner to come forth with facts in support of his claims. As this Court has noted in the antitrust context,

> While we recognize the importance of preserving litigants' rights to a trial on their claims, we are not prepared to extend those rights to the point of requiring that anyone who files an antitrust complaint setting forth a valid cause of action to be entitled to a full-dress trial notwithstanding the absence of any significant probative evidence tending to support the complaint.

*First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 290 (1968). The fact that a plaintiff alleges a violation of his federal civil rights does not alter this burden of pleading or proof. *Butz v. Economu*, 438 U.S. 478, 507-8 (1978) ("damage suits concerning constitutional violations need not proceed to trial, but can be terminated on a properly supported motion for summary judgment").

The federal courts have been made particularly attractive to claimants by reason of the expansive remedies they offer in certain civil actions. The case at bar epitomizes the problem. The lure of treble damages in antitrust actions and attorneys' fees in civil rights actions apparently proved irresistible to the petitioner. In order to avail himself of the federal largesse, he conjured up a vision of conspiracy and bias through "murky allegations as to motive plus mere contact plus the fact of [the denial of his gravel permit] linked together by speculation and conclusory allegations." *Cole v. Gray*, 638 F. 2d 804, 811 (C.A. 5, 1981), *cert. denied*, 454 U.S. 838 (1981).

The Court of Appeals simply recognized the petitioner's allegations as being made solely to acquire federal jurisdiction and properly dismissed them for lack of factual substantiation. This Court should do likewise.

## CONCLUSION

This case presents no substantial federal questions, involves no conflicts between the circuits and involves nothing more than the Court of Appeals affirming a dismissal on summary judgment for lack of any factual basis. The petition for writ of certiorari should be denied.

Respectfully submitted,

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